IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

THE UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT WALTER V. RADOVICH

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I

This brief is filed in reply to the supplemental memorandum of the petitioner, and in response to certain statements made by counsel for the petitioner upon the argument of this cause and in their reply brief filed on the day of argument.

II

Counsel for the petitioner argue that final action in the court-martial of the respondent has never been taken, by dismissal of the charges or otherwise. As we said in our main brief (pp. 31, 38), we think it may be inferred, from the statements made in the petitioner's main brief concerning the court-martial proceedings, that the court-martial case has been dismissed. However this may be, it is plain that the court-martial case has been consummated by final action, so that jeopardy has attached and a subsequent trial for the offense charged is barred. As the petitioner's brief shows (p. 125), the court-martial proceedings were "disapproved" by order of the Secretary of War on July 26, 1946. This disapproval was unqualified. Such unqualified disapproval constitutes, and has been held by the Judge Advocate General of the Army to constitute, a consummation of a trial which will support a plea of former jeopardy. This is clearly shown by Court-Martial Case No. 241027, decided by the Judge Advocate General in 1943 and reported in II Bulletin of the Judge Advocate General of the Army, p. 424. The report of this case in full is as follows:

> Accused was found guilty of larceny of a ring from Mrs. H., in violation of Article of War 93. On the former trial the accused was originally charged with the larceny of the same ring from Mr. H. but, under an amended specification, he was found guilty of larceny of the ring from Mrs. H. The findings and sentence were disapproved and the accused was ordered restored to duty. On the present trial the accused entered a plea of former jeopardy. Held: The record is legally insufficient to support the findings and sentence. *When the former record was acted upon by the reviewing authority, including the findings under the amended specification, the accused was placed in jeopardy for the offense alleged in the amended specification. The unqualified disapproval, therefore, of the record of trial by the reviewing authority without ordering a rehearing constituted a consummation of that trial which operated as a bar to any subsequent trial for the same*

offense. (MCM, 1928, par. 68; Winthrop, 1920 Reprint, pp. 259-260, 451-452). (Emphasis supplied)

It will be noted that in support of his opinion in CM 241027 the Judge Advocate General cited Winthrop, 1920 Reprint. At page 452, one of the pages cited by the Judge Advocate General, Winthrop states (Note 20),

> "The effect of the disapproval is not merely to annul the sentence but also to prevent the accruing of any disability, forfeiture, &c., which would have been incidental upon an approval." DIGEST, 672. And see Circ. 12 of 1883. The disapproval is "tantamount to an acquittal by the court." 13 Opins. At. Gen., 460. That the fact of the disapproval does not divest the accused of the right to plead the acquittal or conviction in the event of a second arraignment for the same offense—see Chapter XVII—"Plea of Former Trial."

Presumably the "reviewing authority" mentioned in CM 241027 was the Commanding General who had appointed the court-martial. If the disapproval of the record of trial by such an officer constituted a consummation which operated as a bar to any subsequent trial for the same offense, then *a fortiori* a similar result must flow from the unqualified disapproval by the Secretary of War, who, of course, is the superior of any Commanding General, and is the constitutional organ of the Commander in Chief.

We emphasize that the action that consummated the court-martial proceedings in the case of Radovich was the unqualified disapproval by the Secretary of War on July 26, 1946. The opinion of the Board of Review (dated August 17, 1945), upon which the petitioner has focused attention, was *not* the operative fact.

The petitioner concedes that "Where the President, acting under AW 49 (10 U. S. C. 1520), personally disapproves the findings and sentence, such action constitutes an acquittal; and AW 40 bars further trial." The petitioner cites examples of Presidential disapprovals which occurred in 1941 and 1943. The case at bar is distinguished from

these, says the petitioner, because "GCMO 240 of 1946, which deals with Radovich's case, is not a disapproval by the President." (Petitioner's Supplemental Memorandum, II, E, (i), mimeographed copy, p. 14). This argument overlooks the fact that on May 26, 1945, by Executive Order No. 9556, 10 F. R. 6151, the President provided for the exercise, by the Secretary of War and the Under Secretary of War, of the court-martial functions, duties and powers of the President under Articles of War 48, 49, 50, 50½, 51, and 52, in all cases of sentences except those extending to death. In pertinent part Executive Order No. 9556 provides as follows:

> 1. Subject to such regulations as may be prescribed by the Secretary of War * * * there is hereby transferred and delegated to * * * the Secretary of War and the Under Secretary of War, the functions, duties, and powers of confirmation vested in the President under Article of War 48, together with the power of commutation, and all functions, duties, and powers vested in the President by Articles of War 49, 50, 50½, 51, and 52, in all cases of sentences except those extending to death; * * *
>
> 2. By virtue of the foregoing transfers and delegations of functions, duties and powers, the same may be exercised by * * * the Secretary of War, [and] the Under Secretary of War * * * respectively, to whom such transfers and delegations are hereby made without the necessity of any signature, approval, ratification or other act by the President of the United States except to the extent required by such regulations as may be issued by the Secretary of War * * * and all officers, officials, and employees of the United States, including disbursing, accounting, and auditing officers, shall give the same effect to any acts of those to whom transfers and delegations are made hereunder as if done by the person or persons in whom the functions, duties and powers were vested prior to such transfers and delegations.

The petitioner attempts to brush aside the words "By order of the Secretary of War", appearing upon the un-

qualified disapproval of the military proceedings against Radovich (Petitioner's Supplemental Memorandum, note 10, mimeographed p. 15). We submit that these words mean, and can only mean, precisely what they say. They import decision and action by the Secretary of War, precisely as an order of a commanding general, issued through his chief of staff or assistant adjutant general, imports decision and action by the commanding general.

The reason why the final quietus was given to the court-martial case by the Secretary of War, instead of by the Commanding General, First Air Force, is doubtless explicitly revealed by the War Department files—which of course are closed to the respondent. By inference from statements made in the petitioner's briefs, however, the reason becomes apparent. Under AW 50½, 10 U.S.C.A. 1522,

> • • • rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority.

The findings and sentence in the Radovich case not having been approved in part only, and the record not having been returned for revision, it follows that the Commanding General was required either to order a rehearing or to dismiss the case. According to the petitioner, the Commanding General did nothing (Petitioner's main Brief, pp. 63, 64; Petitioner's Supplemental Memorandum, mimeographed p. 15). The time within which he could order a rehearing passed (Petitioner's main Brief, pp. 63, 64), so that the only remaining alternative was dismissal of the charges. Still he did nothing. At last, after more than eleven months had

passed, the Commander in Chief himself, through the Secretary of War, took hold of the proceedings and by his unqualified disapproval brought them to a final consummation—in other words he did what his subordinate the Commanding General should have done.[1] That consummation, we repeat, was a bar to any subsequent trial for the same offense.

It will be observed that in CM 241027, cited above, the accused was ordered restored to duty. In the case at bar a further note of finality was added to the unqualified disapproval by the Secretary of War on July 26, 1946, in that subsequent to this disapproval, on October 1, 1946, the respondent was discharged from the Army. The respondent's discharge is evidenced by an order, now in our possession, dated October 1, 1946, and specifically reciting that he was discharged "By direction of the President". This discharge terminated the respondent's military status and ended court-martial jurisdiction over him, MCM (1928) page 8 par. 10. It emphasized the final and irrevocable termination of the court-martial proceedings by the authority of the President.

III

While we think that the foregoing disposes of the petitioner's attack upon the plea in bar, we venture to suggest a broader ground of decision.

The petitioner asserts that no conviction may be pleaded in bar until it has become "final". While this doctrine has been frequently applied to justify successive trials in the same cause, it produces monstrous results when invoked to permit successive or simultaneous trials for the same offense in two or more independent causes and courts. Having tried, convicted and sentenced a man before a court-martial, the Government may indefinitely postpone final

[1] As Commander in Chief the President of course might have directed a rehearing in the first instance, and he might have convened a court-martial for the purpose, A. W. 8, 10 U. S. C. A. 1479. He was also the "confirming authority" under A. W. 48 and A. W. 50½.

action in the case during the process of review. This postponement may be effected without the knowledge or consent of the accused, for the review of military cases is automatic and does not involve affirmative action by the accused. Having thus by its own motion placed the court-martial case in a state of suspended animation, the Government may then proceed to indict, try, convict, and sentence the accused in a civil court, for the same offense, and prosecute this proceeding to final judgment. By the whim of the Government the accused is deprived of his right to plead the military conviction in bar in the civil court. Having achieved a final conviction in the civil court, the Government may then bring the military proceedings to a close, by entering a final judgment of conviction or an order of dismissal, i.e. of acquittal. We submit that such a result and such a doctrine are contrary to the spirit and purpose of the constitutional inhibition against double jeopardy. As Mr. Justice Holmes observed in his dissent in *Kepner* v. *United States*, 195 U. S. 100, 134, with respect to the principle of double jeopardy:

> *Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once.*

We submit that the Government should not be permitted to say that a man has not been tried once, and that he may be tried for the same offense in an independent case and a different court, when the final consummation of a first trial has been deliberately delayed by the Government without the consent of the accused and without affirmative action on his part. We submit that the rule of the *Kepner* decision should be applied here.

The argument of the petitioner in its supplemental memorandum (mimeographed pp. 4, 5) that Radovich "embraced the results" of the review and is therefore "bound by its burden, viz., that there has not been a valid trial", is wide of the mark. The review was automatic. Radovich had nothing to do with starting it, he had nothing to do with its progress or lack of progress; he might state his

case before the Board of Review, but that was all he could do, and whether he did so or not, the machinery would grind on. In accordance with Army practice, the action of the Board of Review, and indeed all that was done after the findings and sentence of the court-martial were first announced in open court on June 29, 1945, were kept a secret from him. He could hardly "embrace the results" of which he was ignorant. In any event he had no choice under the law; it was not for him to accept or reject anything. He was simply a billet of wood in the military lathe. We submit that under those circumstances it is going far to say that Radovich "accepted" anything, or "consented" to a retrial, or "waived" his right to plead former jeopardy.[2]

IV

Counsel for the petitioner suggest in their reply brief (pp. 8-12) that the question of the voluntary nature of the respondent's confession was submitted to the jury. The record shows, however, that a request by the respondent that this issue be submitted to the jury was denied by the Court (R. 1143, 1144, 1113, 1114); and that the Court told the jury that the confession was "not coerced nor induced by promises" (R. 1140, 1141). Exceptions to the Court's ruling and charge in this respect were noted (R. 1143, 1144) and the matter was assigned as error in the Circuit Court of Appeals (R. 1458, 1461), in view of *Wilson* v. *United States*, 162 U. S. 613; *McAfee* v. *United States*, 70 App. D. C. 142, 105 F. (2d) 21, 24, and *McNabb* v. *United States*, 318 U. S. 332, 338, note 5.

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[2] *Sanford* v. *Robbins*, 115 F. (2d) 435 (C. C. A. 5), cited by the petitioner (Supplemental Memorandum, mimeographed p. 5), is not apposite. In that case the first trial was a nullity and a retrial was ordered by the President. In the case at bar the first trial was not a nullity and no retrial was ordered—on the contrary the President finally disapproved and ended the proceedings.

V

From first to last, improperly we think, counsel for the petitioner have injected into the record "facts" to serve their purpose. They suggest in their reply brief (p. 6), and they asserted at the argument, that the psychopathic ward was the only place available at Mitchel Field for the confinement of an officer. Under these circumstances we deem it proper to state, upon our own personal knowledge, that other places of confinement for officers were available at Mitchel Field. Major Radovich himself was confined in his quarters for some time after his conviction and sentence by court-martial and we know that in the cases of other officers, including at least one other officer charged with bribery (and later convicted and sentenced therefor), confinement in quarters was imposed. Counsel for the petitioner would have been more accurate had they stated that the psychopathic ward was the only place at Mitchel Field where the peculiar type of harassment, visited upon Major Radovich, could be practiced.

Respectfully submitted,

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April 11, 1947

SUPREME COURT OF THE UNITED STATES

No. 606.—October Term, 1946.

The United States of America, Petitioner, *v.* Samuel Bayer, Elias Bayer and Walter V. Radovich.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 9, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

This is a sordid three-sided case. The Government charged all of the defendants with conspiring to defraud by depriving it of the faithful services of an Army officer. 18 U. S. C. § 88; 35 Stat. 1096. The defendant Radovich, the officer in question, admits receipt of money from the other defendants and admits the questioned actions but denies the conspiracy, claiming the others induced him to accept a bribe. The defendants Bayer admit payment of the money but claim they were victims of extortion by Radovich. The jury found all guilty but recommended "the highest degree of clemency for all three defendants." The Court of Appeals for the Second Circuit reversed.[1] We granted the Government's petition for certiorari.[2]

The principal facts are admitted and it is contested inferences which are decisive of the issue of guilt. None of the defendants testified. It would serve no purpose to review the evidence in detail. It justifies finding as follows:

The Bayer brothers were manufacturers of yarn and thread and bore good names in their circle. Samuel had

[1] *United States* v. *Bayer*, 156 F. 2d 964.

[2] — U. S. —.

three sons in the service. One of them, Martin, with Melvin Usdan, a nephew of both Bayers, was involved in this case. Martin's health had not been robust. These two boys enlisted in the Air Corps on the day which Samuel had learned was the last on which a volunteer could select the branch in which to serve. They were almost immediately assigned as file clerks at Mitchel Field, Long Island. In January 1943, at a night club, Elias Bayer picked up the acquaintance of two officers stationed there. They were interested in obtaining uniforms at wholesale. The Bayers eventually aided them and others to obtain uniforms and paid for them, though they claim to have understood that the officers were to pay for them. The acquaintance extended to other officers, and there was considerable entertainment. In April 1943 replacement of men in clerical positions by Women's Army Corps personnel was impending and one Col. Jacobson requested a transfer of these two boys with the effect, as Samuel understood it, of assuring them a year's assignment at Mitchel Field. Jacobson was given a dinner at the Waldorf and presented with four new automobile tires.

This transfer placed the two boys under command of Radovich. By July there were rumors that the officers were receiving gifts from the Bayers and Radovich told Samuel that the boys would have to be transferred. Samuel wanted them kept at Mitchel Field. Radovich made a transfer from his unit to the medical detachment at the same field, which at first was disapproved, and then he accomplished it by an exchange of personnel. After the transfer was made, Samuel paid Radovich some $1,900 or $2,000.

In August 1943 the boys were again transferred to a unit of airborne engineers for overseas duty. Both Bayers were greatly concerned about this and besought their friends among the officers to prevent it. Radovich had

gone. He had joined an Air Commando group with high priority on personnel. But he several times talked with Captain Pepper, in charge of personnel, about transferring these boys from the overseas service to Air Transport Command for service only in continental United States. This could not be done. Then Radovich proposed to use his unit's higher priority to requisition the boys for it, to drop them as surplus, and thereupon to have them transferred to the Air Transport Command for domestic service. Pepper agreed this might be done. Radovich told Pepper it was "worth his while" to get it done and he would see that doing it was worth Pepper's while.

On November 22, 1943 Radovich requisitioned the transfer of the boys to his unit, to report November 25. Almost at once he also requested that they be transferred out of his unit and to Air Transport Command. This was effected shortly. Elias Bayer and one of name unknown to the record then delivered $5,000 to Radovich, who sent Pepper $500. Pepper testified that he destroyed the check.

The Government from these facts and other evidence draws, as did the jury, the inference of conspiracy. The Bayers say they were victims of extortion and there is evidence that Radovich used the transfer to his own unit, one of extremely dangerous mission for which these boys had neither training nor aptitude, to force money out of the Bayers. Radovich denies the conspiracy and pleads certain court-martial proceedings as a bar.

The issue as to whether the Bayers tempted Radovich with a bribe or Radovich coerced them with threats is one with evidence and inferences both ways. Radovich was a gallant and skillful flier and explained his conduct thus: "I was going overseas on a very hot job and didn't expect to come back, had the wife and the baby, figured I might just as well take care of them." The Bayers were persons

of some means, thoroughly frightened at the prospect of service for these boys in combat areas, and ready to use their means to foster the boys' safety. Whether they were victims of extortion or voluntary conspirators was for the jury to say, and the reversal does not rest on any inadequacy of proof. The grounds of reversal by the Court of Appeals raise for our consideration four questions of law.

1. The Bayers assigned as error the trial judge's charge as to conspiracy. The Court of Appeals unanimously said, "There is no question but that this charge was an accurate, albeit brief, statement of the law." But a majority thought that "the statement was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen," while one Judge thought it "a welcome relief from much judicial verbosity."[3] We are not certain whether a reversal as to the Bayers would have been rested on this criticism of the charge alone. We do not consider objection to the charge to amount to reversible error. Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion. The trial judge, in the light of the whole trial and with the jury before him, may feel that to repeat the same words would make them no more clear, and to indulge in variations of statement might well confuse. How far any charge on technical questions of law is really understood by those of lay background would be difficult to ascertain, but it is certainly more evident in the living scene than in a cold record. In this case the jury asked a rereading of the charge on conspiracy. After repeating his instruction, the court inquired of the jury whether anything about it was not clear, or whether there was anything which they desired to have amplified. Nothing was suggested, although inquiry was made as to other

[3] 156 F. 2d at 967.

matters. While many judges would have made a more extended charge, we think the trial court was within its area of discretion in his brevity.

2. The Bayers won reversal on another ground. After the jury had been out about four hours, it returned for instructions and asked to have parts of the summations of counsel read. The court declined to read parts. It was at this point that counsel for the Bayers asked to reopen the case and to put in evidence a long distance call slip from telephone company records. It was the memorandum of a call on November 24, 1943, from one we assume to be Radovich, spelled on the ticket "Ravish," from Arlington, Virginia, to Bayer's number in New York. The ticket tended to corroborate Samuel Bayer's secretary who testified to receiving such a call and who was the Bayers' chief witness on the subject of extortion. It also tended to contradict a Government witness. The matter had become of importance because of the District Attorney's argument that the Bayers' witness falsified her story. The court had already, at respondents' request, after the jury had been instructed, told them that a check of the Bayers' records showed a collect-call from Washington that day, but on request of counsel for Radovich the court had also stated that the record did not show who made the call. We will assume that the proffered evidence was relevant, corroborative of the Bayers' contentions, and had the offer been timely and properly verified, its exclusion would have been prejudicial error.

But the item of evidence was disputed. The District Attorney had not seen the slip and did not admit the interpretation Bayer's counsel put upon it. Counsel for Radovich objected. To have admitted it over his objection might well have been prejudicial to him. The trial court had already, as he admitted, and as Radovich's counsel charged, given the Bayers the benefit of an irregular conveyance of information to the jury about the call

which had not been regularly proved. Moreover, defendants offered no witness to authenticate the slip. As the trial court pointed out to counsel, his proposal was merely to hand to the jury "an unverified memorandum from the telephone company." Even during the trial such an offer, with no foundation in testimony and against objection, would have been inadequate. To have admitted it with no witness to identify or support it would have cut off all cross-examination by both the Government and Radovich, and cross-examination would not have been unreasonable concerning a slip in which the Bayers wished Arlington to be taken as equivalent to Washington and "Ravish" to identify Radovich. The evidence, if put in after four hours of deliberation by the jury, would likely be of distorted importance. It surely would have been prejudicial to the Government for the District Attorney would then have had no chance to comment on it, summation having been closed. It also would have been prejudicial to the other defendant, Radovich, who, with no chance to cross-examine or to comment, would be confronted with a new item of evidence against him. The court seems to have faced a dilemma, either to grant a mistrial and start the whole case over again or to deny the Bayers' request. Certainly a defendant who seeks thus to destroy a trial must bring his demand within the rules of proof and do something to excuse its untimeliness.

Not only was the proffer of the evidence technically deficient, but no excuse for the untimeliness of the offer appeared. It is true, no doubt, that counsel was surprised at the argument made by the District Attorney which would have been less effective had this evidence been in. But Miss Solomon, an employee of defendants and, hence, an interested witness, was left to carry the burden of proving extortion without the corroboration of the testimony of her employer-defendants. This was defendants' right, but it should have been apparent that every bolster

to her credibility would be important. It is well known that the telephone companies keep such records and they seem to have been easily obtained when asked for. We do not consider it reversible error to refuse to let this unsworn, unverified slip be put into evidence four hours after the case had been submitted to the jury. The judgment of reversal as to the Bayers was, in our opinion, erroneous.

3. Radovich's case raises additional questions. The first concerns the receipt in evidence of his confession of March 15 and 17, 1945. In absence of the jury, the Court heard testimony before admitting it and thereafter most of it was repeated before the jury. The proof against Radovich largely rested on the confession.

After service of distinction in Burma, Radovich, then 24 years of age, was ordered to report to Mitchell Field. Upon arrival on August 9, 1944, he was placed under arrest and confined in the psychopathic ward in the station hospital. Here, for some time, he was denied callers, communication, comforts and facilities which it is needless to detail. Charges for court-martial were not promptly served on him as said to be required by the 70th Article of War, nor was he taken before a magistrate for arraignment on any charges preferred by civil authorities. Military charges were finally served on May 30, 1945. Meanwhile, under such restraint, he made a first confession on September 5 or 6, 1944. Without more, we will assume this confession to be inadmissible under the rule laid down in *McNabb* v. *United States*, 318 U. S. 332, and *Anderson* v. *United States*, 318 U. S. 350. But this confession was neither offered nor received in evidence.

A second confession made to Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945 was received, however, and the Court of Appeals has held it to be "patently the fruit of the earlier one" [4] and equally

[4] 156 F. 2d at 970.

inadmissible, citing *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338.

At the time of this confession Radovich was still at Mitchel Field, but only under "administrative restrictions," which meant that he could not depart the limits of the base without leave. Flynn testified that Radovich had a number of conversations with F. B. I. agents. He had volunteered some facts not in the original statement and the meeting of March was to incorporate the whole story in one statement. Flynn warned him his statement might be used against him. Radovich requested the original statement and read it before making the second. The March statement is labeled a "supplementary" statement and is "basically" the same as the earlier one but went into more detail. The District Attorney refused to produce the first statement, which was not offered in evidence, and the court sustained him, having examined the statement and found no material conflict between them.

Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The *Silverthorne* and *Nardone* cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question. The second confession in this case was made six months after the first. The only restraint under which Radovich labored was that he could

not leave the base limits without permission. Certainly such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession voluntarily given after fair warning invalid as evidence against him. We hold the admission of the confession was not error. *Cf. Lyons* v. *Oklahoma*, 322 U. S. 596.

4. Lastly, we must consider whether the court-martial proceedings instituted against Radovich bar this prosecution on the ground of double jeopardy. Radovich was tried and, on June 29, 1945, convicted by court-martial of violating the 95th and 96th Articles of War, 10 U. S. C. §§ 1567, 1568, 41 Stat. 806–807. The offense charged and found was that of conduct unbecoming an officer and gentleman, and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service. As to each offense, the specifications set forth receipt of the same payments of money from the Bayers for effecting the same transfers that are involved in this indictment. Radovich's plea in bar was overruled by the trial court upon the ground that the conspiracy charged in the indictment was not the same offense as that under the Articles of War. The Court of Appeals disapproved this ground but left the issue of double jeopardy to be decided after retrial because of doubt meanwhile raised about the status of the military judgment.

The Court of Appeals thought the identity of the specifications in the court-martial proceedings and the offense charged in the indictment, and the likelihood that the military court did not distinguish carefully between the passing of the money and the arrangement to that end, required the plea in bar to be sustained under *Grafton* v. *United States*, 206 U. S. 333. In that case a soldier on guard duty in the Philippines shot and killed two Filipinos. He was tried by court-martial on charge of homicide and acquitted. A prosecuting attorney of the Islands then

filed in Provincial Court a charge of "assassination" on identical facts. This Court found not merely the evidence but the offense charged to be identical in everything but name, and held retrial of the same offense in Philippine Courts to constitute double jeopardy.

But here we think the District Court correctly ruled that the two charges did not accuse of identical offenses. The indictment is for conspiring and we have but recently reviewed the nature of that offense. *Pinkerton* v. *United States*, 328 U. S. 640. Its essence is in the agreement or confederation to commit a crime, and that is what is punishable as a conspiracy, if any overt act is taken in pursuit of it. The agreement is punishable whether or not the contemplated crime is consummated. But the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself. *Pinkerton* v. *United States*, 328 U. S. 640, 644. In the court-martial proceedings, Radovich alone was accused. No conspiracy was alleged and the specification was confined to Radovich's receipt of money for effecting transfers. This was a substantive offense on his part under the Articles of War. The agreement with others to commit it constituted a separate offense, although among the overt acts proved to establish the conspiracy were the same payments and transfers. Both offenses could be charged and conviction had on each. The plea in bar was properly overruled.

This conclusion makes it unnecessary to decide whether the disapproval of the court-martial judgment for errors in trial and without ordering retrial creates a status for the military judgment such that in no event would it be available to bar this prosecution.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

MR. JUSTICE FRANKFURTER would affirm the decision of the Circuit Court of Appeals substantially for the reasons set forth below by Judge Clark in reversing the conviction of the Bayers, which, under a charge of conspiracy, carries with it a reversal as to Radovich. 156 F. 2d 964, 967–68.

MR. JUSTICE RUTLEDGE is of the view that the judgment of the Circuit Court of Appeals should be affirmed insofar as it relates to the respondent Radovich, for the reasons stated in that court's opinion. 156 F. 2d 964, 968–70.